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Low Ah Leck v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–237 OF 2010
LOW HOP BING, KN SEGARAAND AZAHAR MOHAMED JJCA
23 FEBRUARY 2012

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Criminal Procedure — Search — Search list — Police jointly arrested two men on suspicion of drug trafficking — Search list prepared at scene noted fact of searching both men and seizure of plastic bag containing drugs — No mention in search list of how articles were seized or from where — Whether doubt raised as to which of the two men had possession of drugs — Only one man charged — Whether inference that drugs were not in accused's possession should be adopted

D

The High Court had sentenced the appellant to death after finding him guilty of trafficking in 353.2g methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952. He appealed to the Court of Appeal against the decision. According to the prosecution's evidence at the trial, a police officer, 'SP1', acting on a tip-off, had led a police party to wait in ambush near a restaurant when he saw the appellant walking with a white plastic bag ('P12') in hand to meet another man in front of the restaurant. When the appellant and the other man started talking, SP1 and his men closed in and arrested them. SP1 had told the trial court that at the time he arrested the appellant, the latter was still holding on to P12. Another member of the police party, SP4, arrested the other man ('KPS'). SP1 said the drugs were found in P12. He then searched both the appellant and KPS and noted down in a search list ('P5') the fact of having searched both men and the seizure of the drugs and made both the appellant and KPS sign the search list. SP1 did not fill in the remarks column in P5 to state from where, and how, the articles were seized. KPS was not charged with any offence nor did he testify for the prosecution to say P12 was seized from the accused. KPS died before the trial. The main ground in the appeal was that the conviction was unsafe as P5 was signed by both the appellant and KPS and this raised a reasonable doubt as to who actually had possession of P12 at the material time.

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Held, allowing the appeal, setting aside the decision of the High Court and acquitting and discharging the appellant:

I

(1) (per **Low Hop Bing** and **KN Segara JJCA**) The prosecution's evidence admitted to two more inferences, viz (a) the drug was in the accused's possession and (b) the drug was in KPS's possession. In such circumstances, it is trite law that the inference that was more favourable to the accused should be adopted (see para 8).

(2) (per **Low Hop Bing** and **KN Segara JJCA**) It was unsafe for the trial court to come to the finding that the accused was in possession of the drug. The prosecution had not discharged its standard of proof beyond reasonable doubt (see para 9).

(3) (per **KN Segara JCA**) As P5 was a contemporaneous document prepared by SP1 after a joint search of and seizure from the appellant and KPS, there was serious doubt whether possession of P12 was in fact at all material times in the hands of the accused as testified by SP1 and SP4 almost two years after the incident (see para 13).

(4) (per **KN Segara JCA**) Notwithstanding the testimony of SP1 and SP4 that the accused was seen carrying P12, it was unsafe to find that P12 was in fact seized from the accused or was in fact in his possession at any material time, regard being had to (i) the defence that police found P12 beside a drain near the tyre of a car at the scene; (ii) P5 containing no evidence to incriminate the accused with possession of P12 and (iii) the absence of any credible evidence from the prosecution exculpating KPS, bearing in mind P5 could give rise to the inference that P12 could very well have been in his possession (see para 14).

(5) (per **Azahar Mohamed JCA**, dissenting) The appellant's complaint turned upon a question of fact based upon the credibility of PW1 and PW4. Both these witnesses had testified that at the material time the appellant was holding P12, even when he was arrested. The trial judge accepted their evidence and found both witnesses reliable and truthful. Her findings of fact did not contain any error warranting appellate intervention (see para 23).

(6) (per **Azahar Mohamed JCA**, dissenting) The trial judge found the defence's conflicting version of how P12 was recovered lacked credibility and that the appellant had not created any reasonable doubt on the prosecution's case. She was justified in so doing. There was no infirmity in her appreciation of the evidence of PW1 and PW4 (see para 26).

(7) (per **Azahar Mohamed JCA**, dissenting) In cross-examination, PW1 refuted any suggestion that P12 could have been in KPS's possession. In re-examination, he had explained why he did not state in P5 where P12 was found. This explanation must only be determined by the trial judge as a trier of fact. Since this issue involved PW1's credibility, the trial judge was, as a matter of fact, a better person either to accept or reject his explanation. Having regard to the circumstances of the case, she was justified in accepting his explanation (see para 32).

(8) (per **Azahar Mohamed JCA**, dissenting) The issue regarding P5 was incapable of raising a reasonable doubt on the prosecution's case. The prosecution's evidence against the appellant was compelling (see para 33).

[Bahasa Malaysia summary

Mahkamah Tinggi telah menjatuhkan hukuman mati ke atas perayu selepas didapati bersalah mengedar 353.2g methamphetamine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Dia merayu kepada Mahkamah Rayuan terhadap keputusan tersebut. Menurut bukti pendakwaan ketika perbicaraan tersebut, seorang pegawai polis, 'SP1', yang bertindak memberi maklumat, telah membawa sepasukan polis menunggu untuk menyerang hendap berhampiran sebuah restoran apabila dia melihat perayu berjalan dengan satu beg plastik putih ('P12') di tangannya untuk bertemu dengan seorang lelaki lain di hadapan restoran tersebut. Apabila perayu dan lelaki yang seorang lagi mula bercakap, SP1 dan anggotanya mengepung dan menahan mereka. SP1 telah memberitahu mahkamah bicara bahawa semasa perayu ditangkap, perayu, dia masih memegang P12. Seorang lagi anggota polis, SP4, menahan lelaki yang seorang lagi ('KPS). SP1 mengatakan dadah ditemui dalam P12. Dia kemudian memeriksa kedua-dua perayu dan KPS dan mencatatkannya dalam senarai carian ('P5') fakta bahawa kedua-dua lelaki telah diperiksa dan rampasan dadah dan mengarahkan kedua-dua perayu dan KPS menandatangani senarai carian tersebut. SP1 tidak mengisi ruang catatan dalam P5 untuk menyatakan dari mana, dan bagaimana, bahan-bahan tersebut telah dirampas. KPS tidak dituduh dengan apa-apa kesalahan dan dia juga tidak memberi keterangan bagi pihak pendakwa mengatakan P12 telah dirampas daripada tertuduh. KPS meninggal dunia sebelum perbicaraan. Alasan utama dalam rayuan itu adalah bahawa sabitan adalah tidak selamat kerana P5 telah ditandatangani oleh kedua-dua perayu dan KPS dan ini menimbulkan keraguan yang munasabah mengenai siapakah yang sebenarnya mempunyai milikan P12 pada waktu yang material.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membebaskan dan melepaskan perayu:

(1) (oleh **Low Hop Bing** dan **KN Segara HHMR**) Keterangan pendakwaan memperakui dua inferens lagi, iaitu (a) dadah tersebut adalah dalam milikan tertuduh dan (b) dadah dalam dalam milikan KPS. Dalam keadaan sedemikian, adalah undang-undang nyata bahawa inferens yang lebih memihak kepada tertuduh perlulah diguna pakai (lihat perenggan 8).

(2) (oleh **Low Hop Bing** dan **KN Segara HHMR**) Adalah tidak selamat untuk mahkamah perbicaraan menyimpulkan bahawa tertuduh memiliki dadah. Pihak pendakwaan tidak melepaskan beban bukti melampaui keraguan yang munasabah (lihat perenggan 9).

(3) (oleh **KN Segara HMR**) Oleh kerana P5 adalah dokumen semasa yang disediakan oleh SP1 selepas carian bersama dan rampasan dari perayu dan KPS, terdapat keraguan yang serius sama ada milikan ke atas P12 adalah sebenarnya pada setiap masa material dalam tangan tertuduh

seperti mana keterangan oleh SP1 dan SP4 hampir dua tahun selepas kejadian tersebut (lihat perenggan 13).

(4) (oleh **KN Segara HMR**) Walaupun keterangan SP1 dan SP4 bahawa tertuduh dilihat membawa P12, adalah tidak selamat untuk memutuskan bahawa P12 sebenarnya dirampas daripada tertuduh atau sebenarnya dalam milikannya pada masa yang material, dengan mengambil kira (i) pembelaan bahawa polis menemui P12 di tepi longkang berhampiran tayar kereta di tempat kejadian; (ii) P5 tidak mengandungi bukti untuk menunjukkan bahawa tertuduh memiliki P12; dan (iii) ketiadaan apa-apa keterangan yang boleh dipercayai daripada pendakwaan membebaskan KPS, menjadi satu peringatan bahawa P5 boleh membawa kepada inferens P12 sepatutnya boleh berada dalam milikannya (lihat perenggan 14).

(5) (oleh **Azahar Mohamed HMR**, menentang) Aduan perayu berubah menjadi suatu persoalan fakta yang berasaskan kredibiliti PW1 dan PW4. Kedua-dua saksi telah memberi keterangan bahawa pada masa material perayu memegang P12, walaupun ketika dia ditahan. Hakim bicara menerima keterangan mereka dan mendapati kedua-dua saksi boleh dipercayai dan bercakap benar. Dapatan faktanya tidak mengandungi apa-apa kesilapan yang mewajarkan campur tangan Mahkamah Rayuan (lihat perenggan 23).

(6) (oleh **Azahar Mohamed HMR**, menentang) Hakim bicara mendapati versi pendakwaan bercanggah tentang bagaimana P12 dirampas kurang kredibiliti dan bahawa perayu tidak mewujudkan sebarang keraguan munasabah dalam kes pendakwaan. Beliau wajar dalam tindakannya. Tiada ada kelemahan dalam penelitian keterangan PW1 dan PW4 (lihat perenggan 26).

(7) (oleh **Azahar Mohamed HMR**, menentang) Dalam pemeriksaan balas, PW1 menyangkal sebarang cadangan bahawa P12 mungkin dalam milikan KPS. Dalam pemeriksaan semula, beliau telah menjelaskan mengapa dia tidak menyatakan dalam P5 di mana P12 dijumpai. Penjelasan ini hanya boleh ditentukan oleh hakim bicara sebagai *trier of fact*. Oleh kerana isu ini melibatkan kredibiliti PW1, hakim bicara adalah, sebenarnya, seseorang yang lebih sesuai untuk sama ada menerima atau menolak penjelasannya. Dengan mengambil kira hal keadaan kes tersebut, beliau adalah berjustifikasi dalam menerima penjelasannya (lihat perenggan 32).

(8) (oleh **Azahar Mohamed HMR**, menentang) Isu mengenai P5 adalah tidak berupaya untuk menimbulkan keraguan munasabah terhadap kes pendakwaan. Keterangan pihak pendakwaan terhadap perayu adalah memaksa (lihat perenggan 33).]

Notes

For cases on search list see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3441–3442

Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)

Magendran a/l Mohan v PP [2011] 6 MLJ 1, FC (refd)

Mohamed Yatim bin Abu Bakar v PP [1950] 1 MLJ 57 (refd)

PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)

Tai Chai Keh v PP [1948–1949] Supp MLJ 105, CA (refd)

Wan Mazuki bin Wan Abdullah v PP Rayuan Jenayah No 05–56 of 2008 (T) (refd)

Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Evidence Act 1950 s 32(1)

Dangerous Drugs Act 1952 ss 37(da)(xvi), 39B(1)(a), (2), First Schedule

Appeal from: Criminal Case No 45–90 of 2008 (High Court, Shah Alam)

Lt Kol Roseli bin Abdul Gani (B) (AG Roseli & Assoc) for the appellant.

How May Ling (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Low Hop Bing JCA:

[1] The accused has been convicted of the offence of trafficking in 353.2g of methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 and mandatorily sentenced to death under s 39B(2) of the same Act.

[2] An essential ingredient to sustain the offence of trafficking is possession of the drug in question.

[3] Evidence was adduced for the prosecution through SP1 and SP4. I note that SP1 has tendered a search list in exh P5 at p 340 of the appeal record. It states expressly that two persons viz the accused and one Kwong Peng Seng have been searched ('yang kena periksa'). From these two persons, the TESCO EXTRA plastic bag containing the impugned drug and several other items had been seized ('dirampas') as listed therein. Both the accused and the said Kwong Peng Seng had signed the search list and confirmed the search and seizure of the said articles from both of them.

[4] In SP1's evidence, he agreed that the 'catatan' (remarks) column had been left blank and that the 'catatan' column was for him (ie SP1) to state from where and how the abovesaid articles have been seized. SP1 admitted that from where and how the abovesaid articles have been seized is of the utmost importance in this case ('amat penting dalam kes ini').

[5] When P5 was referred to SP1, SP1 confirmed that the aforesaid two persons had been searched ('kena periksa'); and that Kwong Peng Seng had been arrested because he was also suspected to be involved. The said Kwong Peng Seng was not charged, but has since passed away. SP1 further confirmed that the TESCO EXTRA plastic bag did not contain the personal things of anybody ('tidak ada barang-barang peribadi sesiapa') (see pp 59–60 AR).

[6] Given the aforesaid documentary and oral testimony of SP1, the question for our determination is whether the accused can be said to be in possession of the impugned incriminating drug which had been seized from both the accused and the deceased after a search on both of them. I answer this question in the negative.

[7] The prosecution evidence admits of two more inferences viz:

(a) the impugned incriminating drug was in the accused's possession; and

(b) the said drug was in the deceased's possession.

[8] In such circumstances, it is trite law that the inference that is more favourable to the accused should be adopted. *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; and *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ (FC), applying *Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105, at p 108.

[9] Therefore, I am of the view that it is unsafe for the trial court to come to a finding that the accused was in possession of the impugned incriminating drug. I am mindful of the fact that this appeal concerns mandatory death sentence and the prosecution's standard of proof beyond reasonable doubt must be strictly established. I am not prepared to say that the prosecution has discharged this standard of proof.

[10] I am therefore unable to agree with the decision of the learned judicial commissioner in finding the accused guilty and convicting the accused.

[11] I therefore allow this appeal, set aside the entire decision of the High Court and substitute it with an order that the accused be acquitted and discharged.

KN Segara JCA:

[12] I am in complete agreement with the decision and grounds in the oral judgment of my brother justice Low Hop Bing. I only wish to add briefly as follows in support of his decision.

[13] In view of the fact that exh P5 (search list) is a *contemporaneous* document prepared by SP1 on *23 May 2008* after the joint search of and seizure from the appellant (accused) and one other suspect Kwong Peng Seng at the scene of the alleged trafficking, there is a serious doubt as to whether possession of the plastic bag was in fact at all material times in the hands of the accused as testified by SP1 and SP4 on 2 March 2010 and 4 March 2010, almost two years after the incident.

[14] Further, as the other suspect, one Kwong Peng Seng, had also signed the document exh P5 jointly together with the accused as evidence and acknowledgement of the seizure of the several items listed therein (including the plastic bag), and the said Kwong Peng Seng was:

(a) neither charged with any offence nor did he

(b) testify on behalf of the prosecution that the plastic bag was seized from the accused,

it is *unsafe* to make a finding that the plastic bag was in fact seized from the accused or was in fact in the *possession* of the accused at any material time notwithstanding the oral testimony of SP1 and SP4 that the accused was seen carrying the plastic bag in his hand, having regard in particular to the following:

(a) the defence that the plastic bag was found (by the police) beside the drain near the tyre of the car at the scene of the alleged trafficking and;

(b) the contemporaneous document P5, with the two suspects' signatures, was prepared by SP1 himself, with no evidence therein, direct or indirect, to incriminate the *accused with possession* of the plastic bag; and

(c) the absence of any credible evidence tendered by the prosecution exculpating or exculpatory of Kwong Peng Seng, bearing in mind the contemporaneous document P5 could give rise to the inference that the plastic bag could very well have been in the possession of Kwong Peng Seng.

[15] The conviction of the appellant for an offence carrying the mandatory death sentence is unsafe.

[16] I agree that this appeal should be allowed. Conviction and sentence of the trial judge set aside. The appellant acquitted and discharged.

Azahar Mohamed JCA (dissenting):

[17] The appellant was charged in the High Court at Shah Alam for trafficking in 353.2g of methamphetamine contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act).

[18] He was convicted on the charge and was sentenced to death by hanging as mandated by the law. He appealed to this court against the decision.

[19] The facts of the case are well set out in the judgment of the learned judicial commissioner (see appeal record Vol 4, pp 287–290). Here, I will only repeat in the following paragraphs the pertinent facts as narrated by her in so far as they are relevant to the issues which arise for decision in this appeal:

> Pada jam lebih kurang 3.00 petang, ASP Norasib bin Hj Mamat (SP1) telah menerima maklumat daripada suatu sumber mengenai kegiatan pengedaran dadah jenis syabu di kawasan Ampang.
>
> Bertindak atas maklumat tersebut SP1 telah mengarahkan pegawainya yang terdiri daripada C/Inspektor Mohd Husni bin Manaf (SP4), D/Sarjan Mohd Khalid, D/Mohd Yusoff, D/Sarjan Rohaya, D/Koperal Aminudin, D/Korporal Mohd Sidek, D/Koperal Ramachandran, D/Koperal Shamsuri dan D/Koperal Roslan untuk hadir taklimat pada jam lebih kurang 4.00 petang di kawasan Masjid Pandan Indah. Taklimat berjalan lebih kurang 20 minit.
>
> Dalam taklimat tersebut SP1 membahagikan pegawai dan anggotanya pada empat kumpulan. Sarjan Rohaya ditempatkan di dalam Restoran A & W, tiga kumpulan lain berada di hadapan dan juga di bahagian kiri dan kanan Restoran A & W.
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> Pada jam lebih kurang jam 4.45 petang, SP1 bersama anggotanya telah sampai ke Restoran A&W. SP1 yang memandu sebuah kenderaan Myvi miliknya bersama-sama dengan SP4 mengambil posisi di bahagian hadapan Restoran A & W iaitu di tepi jalan dengan jarak lebih kurang 15 meter daripada Restoran A & W (lihat tandaan (SP1) dalam P4). Sementara anggota lain berada dalam dua buah kereta yang lain di sebelah kin dan kanan Restoran A&W.
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> Selepas SP1 dan anggota membuat pemerhatian di Restoran A & W pada jam lebih kurang 5.05 petang, SP1 nampak satu orang lelaki Cina sedang berdiri di hadapan pintu Restoran A & W iaitu di kaki lima Restoran A & W. Dalam tiga atau empat minit kemudian SP1 nampak satu orang lelaki Cina (OKT) berjalan kaki melintasi kereta SP1 dengan menjinjit satu beg plastik berwarna putih (P12) menuju ke arah lelaki yang berada di hadapan Restoran A & W.
>
> Apabila OKT sampai ke tempat lelaki Cina yang seorang lagi berada, SP1 nampak kedua-dua mereka sedang berbual-bual. Pada ketika ini SP1 nampak OKT masih lagi memegang beg plastik putih (P12) yang dipegangnya semasa melintasi kereta SP1 tadi.

SP1 memberi arahan kepada anggotanya untuk bertindak bagi menangkap kedua-dua lelaki ini. SP1 dan SP4 mula-mula tiba di tempat di mana kedua-dua lelaki itu berada dengan diikuti oleh anggota lain. Pada masa SP1 dan SP4 tiba di hadapan Restoran A & W (tempat kejadian), SP1 dan SP4 nampak kedua-kedua lelaki itu terkejut dan lelaki Cina yang mula-mula SP1 nampak di tempat kejadian bergerak untuk beredar daripada tempat kejadian. Setelah itu SP1 bersama Sarjan Sidek dan L/Koperal Shamsuri telah memperkenalkan diri sebagai polis kepada OKT dan terus menangkap OKT.

SP1 juga menerangkan kesalahan yang didakwa dilakukan oleh OKT kepada OKT. Ketika SP1 menangkap OKT beg plastik putih (P12) yang dilihat SP1 dipegang oleh OKT pada masa melintasi keretanya sebelum ini masih lagi berada di tangan kanan OKT. Apabila SP1 memegang tangan OKT, OKT cuba meronta-ronta untuk melarikan diri.

Sementara itu SP4 pula telah menangkap seorang lelaki yang kemudiannya dikenali sebagai Kwong Peng Seng (KPS).

Selepas menangkap OKT dan KPS, iaitu pada jam lebih kurang 5.00 petang, SP1 telah membuat pemeriksaan ke atas OKT dan KPS di tempat kejadian dengan disaksikan oleh anggotanya. Hasil pemeriksaan SP1 mendapati beg plastik yang dirampas dari pegangan OKT berwarna putih bertulisan TESCO Extra (P12) dan di dalam beg plastik yang terbuka itu terdapat satu paket besar lutsinar yang didalamnya mengandungi serbuk dan ketulan kristal disyaki dadah jenis syabu (P13,14&15).

Pemeriksaan lanjut juga dibuat oleh SP1 iaitu di sebuah kereta milik OKT yang diletakkan di kawasan flat yang berdekatan tetapi tiada apa-apa barang salah yang diperoleh daripada kereta OKT.

Borang Pemeriksaan (P5) juga telah dikeluarkan di tempat kejadian. Selepas P5 ditandatangani oleh OKTdan KPS, SP1 telah membawa balik OKT dan KPS ke IPD Ampang bersama-sama barang kes.

[20] The substance and the crystal powder found in the plastic bag ('exh P12') were sent to the Chemistry Department for analysis. Puan Maimonah bt Sulaiman, the chemist (PW7) confirmed them to be drugs categorised as methamphetamine with a net weight of 353.2g listed under the First Schedule of the Act.

[21] As regards Kwong Peng Seng, the learned judicial commissioner in her judgment said as follows:

Pihak pendakwaan telah mengemukakan percakapan KPS yang dibuat di bawah s 112 KTJ (P18), menurut s 32(1) Akta Keterangan 1950 kerana KPS telah meninggal dunia. Fakta menunjukkan OKT telah ditangkap bersama-sama dengan KPS pada hari yang sama. Walaupun percakapan ini boleh diterima masuk menurut s 32(1) Akta Keterangan 1950, saya memilih untuk tidak memberi pertimbangan kepada pernyataan ini. Ini adalah kerana percakapan ini merupakan percakapan KPS yang dibuat selepas ditangkap dan kemungkinan KPS sebagai seorang yang

berkepentingan dalam kes ini boleh memberi apa-apa pernyataan kepada SP5 untuk membebaskan dirinya termasuklah membabitkan orang lain. Seperkara lagi keterangan ini tidak diuji melalui soal balas oleh pembelaan. Demi keadilan kepada pembelaan saya tidak menimbangkan keterangan ini.

[22] In the petition of appeal, the appellant attacked the judgment of the learned judicial commissioner on a number of grounds. What turned out to be of critical importance in the course of the arguments before this court is the ground that the conviction of the appellant is unsafe as the search list (exh P5) were jointly signed by the appellant and Kwong Peng Seng. Learned counsel for the appellant has raised an issue that since the appellant and Kwong Peng Seng were both instructed to sign exh P5, it has raised a reasonable doubt as to the real owner of exh P12. It was argued that this could give rise to the inference that exh P12 could also have been in the possession of the said Kwong Peng Seng. He then referred to the case of *Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105 to support the proposition that when there are two inferences, the inference most favorable to the appellant should be drawn.

[23] I do not agree with this submission. In my judgment, the complaint of the appellant in actual fact turns upon a question of factbased upon the credibility of PW1 and PW4. Both these witnesses had testified that at the material time the appellant was holding exh P12. And furthermore, it was the prosecution's case that the appellant was still holding it when he was arrested by the police. The learned judicial commissioner accepted the evidence of PW1 and PW4. It is her findings that both the witnesses are reliable and are witnesses of truth. In my judgment, her findings of fact do not contain any error warranting appellate intervention (see *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10). As we shall see later, this specific finding of facts is significance on the issue pertaining to exh P5 raised by learned counsel for the appellant.

[24] Since the prosecution had proved the fact that the appellant was in physical control of exh P12, on the facts of the present case, the learned judicial commissioner was entitled and correct in making the finding that the appellant knew all along that exh P12 found on his possession contained the offending drugs (see *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 at p 394 and *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1). What is more, since the weight of the Methamphetamine in question exceeded the quantity specified in s 37(da)(xvi) of the Act, the learned judicial commissioner was entitled to invoke the presumption of trafficking and to hold that a prima facie case had been established against the appellant.

[25] The appellant gave evidence on oath. He had presented a differing version and diametrically opposed to the prosecution's case of how exh P12 was

recovered. He denied that he was holding it when he was arrested by the police. Essentially, his defence was that exh P12 was found by the police at the side of the drain near the tyre of a car.

[26] Given these two conflicting versions, in deciding the issue of the guilt or innocence of the appellant, the learned judicial commissioner must consider whether the prosecution's witnesses were telling the truth and whether the appellant's version had cast a reasonable doubt on the truth of the prosecution's case, (see *Mohamed Yatim bin Abu Bakar v Public Prosecutor* [1950] MLJ 57). After careful consideration and analysis of the two versions, the learned judicial commissioner found that the defence story to lack credibility and that the appellant had not created any reasonable doubt on the prosecution's case. In my view, on the facts of this case, she was justified in so doing. Having read the judgment with care, I am not convinced that there was no judicial appreciation of the evidence of PW1 and PW4 on the part of the learned judicial commissioner. I do not find any infirmity in appreciation of the said evidence. Moreover, it is not the function of this court to substitute its findings for that of the learned judicial commissioner.

[27] I must now direct my attention to the only substantial ground upon which the conviction of the appellant had been attacked by learned counsel which I have alluded to earlier. I have given anxious consideration to the argument raised concerning exh P5. With the greatest of respect, on consideration of material evidence on the appeal record, I am unable to see how its contents can admit two or more inferences or can even raise a reasonable doubt on the prosecution's case. It must be emphasised here that according to PW1 and PW4, the appellant was carrying exh P12 which contained the offending drugs and met up with Kwong Peng Seng. The appellant was still seen holding exh P12 while he and Kwong Peng Seng were having a conversation. Even more to the point is the incontrovertible evidence which unmistakably established that during the arrest exh P12 was seized from the appellant's right hand by PW1. In this lies the flaw of the submission of learned counsel for the appellant.

[28] Exhibit P5 must be scrutinised properly and correctly. It is clear and unambiguous. It is expressly stated in the exhibit that the name of the person who has been searched is the appellant and Kwong Peng Seng. It is true that the exhibit were signed by the appellant as well as Kwong Peng Seng. This is in line with the evidence given by PW1 and PW4 that a search by the police was conducted on both them. But most significantly, nowhere does exh P5 state from where exh P12 containing the drugs was found. Equally important is the need to realise that exh P5 does not state from whom exh P12 was recovered.

Even more, PW1 firmly refuted any suggestion that exh P12 could very well have been in the possession of Kwong Peng Seng. On this issue, PW1 in cross-examination said as follows:

Q: Oleh kerana selain daripada Low Ah Leek ada juga nama Kwong Peng Seng, boleh jadi dadah milik Kwong Peng Seng? Boleh jadi?

A: Saya tidak setuju.

[29] But that is not all. The learned judicial commissioner has also given her most anxious consideration on exh P5. In the words of the learned judicial commissioner:

> Kegagalan SP1 mencatatkan di ruangan catatan di mana bagaimana barang kes dijumpai juga tidak menjejaskan kes pendakwaan. Terdapat keterangan secara terus daripada dua orang saksi pendakwaan iaitu SP1 dan SP4 yang mengesahkan di mana dan bagaimana barang kes ditemui dan tiada alasan bagi saya mempertikaikan kredibiliti mereka.

[30] The passage above makes it patently clear that nothing more may fairly be expected of the learned judicial commissioner on this issue. In my judgment, she directed herself correctly upon this aspect of law. Indeed, this direction is along the approach indicated in the case of *Wan Mazuki bin Wan Abdullah v Public Prosecutor* Rayuan Jenayah No 05–56 2008 (T), which was referred to by the learned deputy public prosecutor in her written submission. In that case, the appellant was convicted of the offence of trafficking in 3224.47g of cannabis. He appealed to the Federal Court against his conviction. In dismissing the appeal, Richard Malanjum CJ (Sabah and Sarawak) said this at para 28 of the judgment:

> Learned counsel also submitted that the before coming to his findings the learned trial judge failed to consider adequately the contents of the opening statement of the learned deputy public prosecutor. He further complained that the search list adduced did not state where the drug was found.

[31] Further down at para 32, His Lordship made an important observation on this point by saying:

> As for the search list we are of the view that the omission is minor and one which could be and was in fact clarified in court by the relevant witnesses called. There is no reason why the omission should be considered fatal as to render the evidence of the relevant witnesses otiose.

[32] In the present case, in re-examination (pp 68–69 of the appeal record) PW1 has explained and clarified in court as to why he did not state in P5 where

A exh P12 was found. This explanation must only be determined by the learned judicial commissioner as a trier of fact. Since this issue involved the credibility of PW1, the learned judicial commissioner was as a matter of fact a better person either to accept or reject his explanation. She accepted PW1's explanation. Having regard to all the surrounding and prevailing
B circumstances of the case, she was justified in so doing.

[33] The upshot of all this is that the issue regarding exh P5 is incapable of raising a reasonable doubt on the prosecution's case.

C

[34] For the reasons that I have stated, I do not see any merit in this appeal. The evidence presented by the prosecution against the appellant was compelling. Having carefully scrutinised all the evidence contained in the appeal record and carefully read the judgment of the learned judicial commissioner, I am wholly satisfied that the conviction of the appellant is safe.
D The appeal is therefore dismissed. The conviction and the death sentence made by the learned judicial commissioner are accordingly affirmed.

Appeal allowed, decision of the High Court set aside and appellant acquitted and discharged.

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Reported by Ashok Kumar

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